

1 THE POLLUTION CONTROL HEARINGS BOARD  
2 STATE OF WASHINGTON

3 SKEERS CONSTRUCTION, INC.,

4 Appellant,

5 v.

6 NORTHWEST CLEAN AIR AGENCY,

7 Respondent.

PCHB NO. 06-004

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

8 This matter arises from the appeal of a \$1,000.00 penalty issued to Skeers Construction,  
9 Inc. (Skeers Construction) by the Northwest Clean Air Agency (NWCCA) for failing to use  
10 Reasonable Available Control Technology (RACT) in violation of NWCAA's regulations while  
11 conducting sandblasting on an exterior concrete wall of a multiplex building.

12 A hearing was held in the above matter on May 4, 2006, in Mt. Vernon, Washington.  
13 William H. Lynch, chair, presided at the short board hearing for the Pollution Control Hearings  
14 Board (Board). Attorney Steven D. Avery represented NWCAA. Mr. Marv Pulst represented  
15 Skeers Construction *pro se*. Ms. Tyan L. Lucas of Likkell and Associates, Everett, Washington,  
16 provided court-reporting services for the Board.

17 The Board received the sworn testimony of witnesses, admitted exhibits, and heard  
18 arguments on behalf of the parties. Having fully considered the record, the Board enters the  
19 following:

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER  
PCHB NO. 06-004

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FINDINGS OF FACT

[1]

On October 21, 2005, at 8:05 a.m., NWCAA received a complaint from Elizabeth Owens that particulate was covering her cars and property from a sandblasting operation conducted next to her house. *Ex. 1; Testimony of Elizabeth Owens; Testimony of Rebecca Brown.* Her home is located on 608 Boulevard Street in Bellingham, Washington. The sandblasting was being conducted on an exterior concrete wall of a building that is located adjacent to the Owens' residence by Skeers Construction. Skeers Construction is a contractor located in Bellingham, Washington.

[2]

Rebecca Brown is employed as an Inspector I with NWCAA. Ms. Brown has been employed by NWCAA for approximately three years and five months. Her duties include conducting inspections in response to complaints. Ms. Brown responded to the complaint submitted from Ms. Owens. *Ex. 2; Testimony of Rebecca Brown.*

[3]

Ms. Brown arrived at the site at approximately 11:45 a.m. No sandblasting was taking place at that time. She observed that surrounding vegetation and cars next to the construction site had an accumulation of a fine-white particulate. She spoke with Morrie DeBoer, who was the foreman for Skeers Construction at the site, about how the plastic tarp was loosely covering the cement with some noticeable gaps. Mr. DeBoer stated that the crew had run out of sandblast

1 grit and would not be sandblasting again for one to three hours. Ms. Brown observed six full  
2 bags of this material in the trailer bed of a vehicle. *Ex. 2; Testimony of Brown.* Ms. Brown took  
3 some photographs to show the loose tarping at the work site as well as some sandblast grit  
4 accumulation. *Ex. 3, pictures 1-4.* Mr. DeBoer also wanted to know who had complained about  
5 the sandblasting activity, and Ms. Brown responded that the person wished to remain  
6 anonymous. Mr. DeBoer said he would follow Ms. Brown around while she did her  
7 investigation to see who complained. Ms. Brown decided not to go to the Owens' residence at  
8 this time, but instead decided to return to the site in 15 minutes to see if the sandblasting would  
9 resume. Ms. Brown left the site at approximately noon. *Ex. 2; Testimony of Brown.*

10 [4]

11 Ms. Brown returned to the construction site at approximately 12:15 p.m. Between the  
12 time she left the site at noon and the time she returned at 12:15, Ms. Owens had called to state  
13 that Skeers Construction had started sandblasting again. Ms. Brown observed that the tarp was  
14 not containing the sandblast grit during the process of sandblasting and spoke to Mr. DeBoer  
15 about her observations. Ms. Brown took pictures to illustrate that the sandblast grit was being  
16 deposited on the Owens' property. *Ex. 3, pictures 5-13.* Pictures 11 and 12 show particulate  
17 from the sandblasting emanating from the tarped area. Picture 13 shows a car about 30 feet from  
18 where the sandblasting was taking place with an accumulation of particulate. Ms. Brown noted  
19 that the conditions at the time were sunny, with a slight wind blowing at 2-3 miles per hour from  
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1 the construction site towards the Owens' property.<sup>1</sup> Ms. Brown left the site at approximately  
2 12:30 p.m.

3 [5]

4 Ms. Brown did not use an opacity meter, but is certified pursuant to NWCAA's  
5 regulations to make visual observations. *Testimony of Brown.*

6 [6]

7 Ms. Brown returned to the site at approximately 4:00 p.m. Ms. Owens had called  
8 NWCAA to state that a cleaning crew from Skeers Construction had been in her yard cleaning up  
9 sandblasting grit. Because of this cleaning, Ms. Brown was unable to take tape lift samples from  
10 the house, porch, or cars. Ms. Brown took some samples of vegetation from the Owens'  
11 property that had accumulated sandblast grit, *Ex. 4*, and took additional pictures to document the  
12 grit on the vegetation. *Ex. 3, pictures 14-21.* Ms. Brown left the property at approximately 4:35  
13 p.m. *Ex. 2, Testimony of Brown.*

14 [7]

15 On November 4, 2005, Ms. Brown issued a Notice of Violation (NOV No. 3511) on  
16 behalf of NWCAA to Skeers Construction for violations of Sections 550.2 and 550.4 of  
17 NWCAA regulations. *Ex. 5; Testimony of Brown.* Section 550.2 makes it unlawful for  
18 sandblasting activity to be conducted without using Reasonable Available Control Technology  
19 (RACT) to prevent the release of particulate matter into the air. Section 550.4 prohibits causing

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21 <sup>1</sup> Ms. Brown's Enforcement Report, Ex. 2, indicates that the wind was blowing from the northeast. Although the  
testimony is unclear as to whether the Owens' residence is northeast or southwest from the project, Ms. Brown  
clarified during her testimony that the wind was blowing towards the Owens' residence from the project site.

1 or allowing “the emission of particulate matter which becomes deposited upon the property of  
2 others in sufficient quantities and of such characteristics and duration as is, or is likely to be,  
3 injurious to human health, plant or animal life, or property, or which unreasonably interferes  
4 with use and enjoyment of life and property.” *Ex. 5.*

5 [8]

6 The NOV issued by Ms. Brown referenced Best Available Control Technology (BACT)  
7 as the applicable standard under Section 550.2. Julie O’Shaughnessy, the Compliance Manager  
8 for NWCAA, testified that the proper standard under Section 550.2 is RACT rather than BACT.  
9 Ms. O’Shaughnessy has worked for NWCAA as the Compliance Manager for six years. As  
10 Compliance Manager, she oversees compliance with air quality standards and regulations by  
11 stationary sources. Ms. O’Shaughnessy testified that NWCAA revised Regulation 550.2 in  
12 1999, which changed the emission limitation to be based upon RACT rather than BACT. RACT  
13 is a less stringent standard with more flexibility than BACT. *Testimony of Ms. O’Shaughnessy.*  
14 The presiding officer was handed a current copy of Section 550.2 during the proceeding and  
15 takes judicial notice that RACT is the appropriate standard to be applied in this case.

16 [9]

17 On November 18, 2005, Skeers Construction sent a letter to NWCAA. The letter states  
18 the corrective actions taken by Skeers’ employees after the sandblasting activity. Workers were  
19 sent to wash down and clean property, including nearby parked vehicles. When these workers  
20 could locate the owners of affected vehicles, the owners were given \$30.00 to have their vehicles  
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1 professionally washed. The letter also states that “We were surprised by the amount of dust,  
2 which was generated . . .” *Ex. 7.*

3 [10]

4 On December 14, 2005, Ms. Brown prepared a penalty recommendation for Ms.  
5 O’Shaughnessy against Skeers Construction for \$1,000.00, with \$500.00 of this amount  
6 suspended. She recommended the penalty amount based upon the fact that it was the first  
7 violation issued to Skeers Construction, any economic benefit was negligible, that Skeers  
8 Construction indicated they would take additional measures next time that might better contain  
9 sandblasting particulates, and that Skeers Construction was not forthcoming during the  
10 investigation of the complaint. *Ex. 8.* Ms. Brown believes that Skeers Construction was aware  
11 that sandblasting would resume in a short period of time rather than the one to three-hour time  
12 period that was communicated to Ms. Brown.

13 [11]

14 On December 16, 2005, NWCAA Director James Randles prepared and mailed by  
15 certified mail to Skeers Construction a Notice of Imposition of Penalty of \$1,000.00. No portion  
16 of this fine was suspended. *Ex. 9.*

17 [12]

18 Morrie DeBoer is the foreman in charge of the crew that did the sandblasting. He stated  
19 that the crew started on the south side of the project and worked its way north. A tent was placed  
20 on a wooden platform and later moved to where it is shown in the pictures. Sandblasting  
21 requires the use of pressurized air. The pressure inside the tent from the sandblasting results in

1 some type of exhaust. He believes corrective action was taken after the dust was first brought to  
2 the crew's attention, because the plastic was pulled down tighter on the end closest to the house  
3 and boards were placed upon it. He did not believe that the use of a baghouse or similar method  
4 of capturing the particulates was necessary in this instance and would not do anything  
5 differently. Mr. DeBoer did not rebut the testimony of Ms. Brown regarding any statements he  
6 made to her. *Testimony of Morrie DeBoer.*

7 [13]

8 Mr. Pulst acknowledged this was the first sandblasting endeavor undertaken by Skeers  
9 Construction. He believes that RACT was used by his laborers, but that the proximity of the  
10 Owens' residence to the project site made it impractical to contain all of the dust on the project  
11 site. He believes that any damage to vegetation, property, or human health would be very minor,  
12 especially in light of the clean up his crew did on the Owens' property. Mr. Pulst points out that  
13 his business is responsible and has never been cited in the past for any violations. He believes  
14 that the complaints from the Owens are due to their opposition to the project going in next door  
15 to them rather than any real damage that they sustained. *Testimony of Marv Pulst.*

16 [14]

17 Seth and Elizabeth Owens reside at the house on 608 Boulevard Street. They are still  
18 finding particulates from the sandblasting activity in their yard, flower box, and on their deck,  
19 railing, chairs, and tables. They were not aware of any damage to their car, and did receive  
20 \$30.00 from Skeers Construction to have it cleaned. Both Mr. and Ms. Owens testified that they

1 did not feel safe being outside while the sandblasting was occurring. Ms. Owens stated she  
2 normally spends a lot of time gardening. *Testimony of Seth and Elizabeth Owens.*

3 [15]

4 A subcontractor previously had done some sandblasting work on the western portion of  
5 the site. The conditions resulting from this work are not related to the citation in dispute. *See*  
6 *Ex. 13. Testimony of Seth and Elizabeth Owens.*

7 [16]

8 NWCAA has prepared “Guidelines for Abrasive Blasting.” This document states:  
9 Abrasive blasting must be performed inside a booth or hangar designed to capture the  
10 blast grit or overspray whenever possible. Outdoor structures or items too large to be  
11 reasonably handled indoors must use control measures such as curtailment during windy  
Ex. 14. periods and enclosure of the area being blasted.

12 [17]

13 Any Conclusion of Law deemed a Finding of Fact is hereby adopted as such.  
14

15 CONCLUSIONS OF LAW

16 [1]

17 The legal issues in this case, as identified in the pre-hearing order, are as follows:

- 18 1. Whether Appellant violated NWCAA Regulation Section 550.2 by  
19 causing or permitting a building to be constructed, altered, repaired or  
20 demolished, or conduct sandblasting, without using Best Available  
21 Control Technology to prevent release of fugitive particulate matter to  
the ambient air.  
2. Whether Appellant violated NWCAA Regulation Section 550.4 by  
causing or permitting the emission of particulate matter which becomes

deposited upon the property of others in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with use and enjoyment of life and property.

3. Whether the penalty issued in relation to the said Violation is reasonable.

[2]

The Board has jurisdiction over the subject matter and the parties. RCW 43.21B.110. In a penalty proceeding before the Board, the initial burden of proof is on NWCAA to demonstrate, by a preponderance of the evidence, that the violation did occur and that the penalty was reasonable. In considering the proper amount of a penalty, the Board makes its determination *de novo*.

[3]

The Washington Clean Air Act declares it is “unlawful for any person to cause air pollution, or permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.” RCW 70.94.040.

[4]

NWCAA Section 550.2 states:

It shall be unlawful for any person to cause or permit a building or its appurtenances to be constructed, altered, repaired or demolished, or conduct abrasive blasting, without using Reasonably Available Control Technology to prevent the release of fugitive particulate matter to the ambient air.

1 [5]

2 RACT “means the lowest emission limit that a particular source or source category is  
3 capable of meeting by the application of control technology that is reasonably available  
4 considering technological and economic feasibility.” RCW 70.94.030(19).

5 [6]

6 RACT is determined on a case-by-case basis. The statute requires taking into account  
7 “the impact of the source upon air quality, the availability of additional controls, the emission  
8 reduction to be achieved by additional controls, the impact of additional controls on air quality,  
9 and the capital and operating costs of the additional controls.” *Id. Bowers v. Southwest Air*  
10 *Pollution Control Authority et al., PCHB No. 98-3 & 98-31 at 19 (Modified Final Findings of*  
11 *Fact, Conclusions of Law and Order) (1999).*

12 [7]

13 The Board is convinced after hearing all of the testimony that the Appellants did not use  
14 RACT. Although controlling the sandblasting grit at the site is difficult when a neighboring  
15 residence is so close, it appears that the plastic tarp utilized was not long enough nor weighted  
16 down sufficiently to contain the large quantity of particulates leaving the site. Additional  
17 precautions such as ensuring the proper positioning of the tarp could be accomplished without  
18 any additional expense. The Board believes this could have been accomplished while still  
19 allowing for some exhaust to escape the tent. Appellants’ own letter to NWCAA acknowledges  
20 that they “were surprised by the amount of dust, which was generated . . . .” The lack of  
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1 appropriate controls is most likely due to the inexperience Skeers Construction has in these type  
2 of sandblasting operations.

3 [8]

4 NWCAA Section 550.4 states:

5 It shall be unlawful for any person to cause or permit the emission of particulate matter  
6 which becomes deposited upon the property of others in sufficient quantities and of such  
7 characteristics and duration as is, or is likely to be, injurious to human health, plant or  
8 animal life, or property, or which unreasonably interferes with enjoyment of life and  
9 property.

8 [9]

9 Skeers Construction argues that because no lasting damage was done, or was so minor,  
10 that a violation should not be found in this case. This, however, does not consist of the entire  
11 test. Both Seth and Elizabeth Owens stated that it was not safe to be outside during the course of  
12 the sandblasting activity because grit was landing across their property. Section 550.4 is violated  
13 when an activity interferes with enjoyment of life and property. The Board has upheld penalties  
14 under somewhat similar circumstances. *See In the Matter of Marine Power and Equipment*  
15 *Company v. Puget Sound Air Pollution Control Agency, PCHB Nos. 81-141, 81-142, & 81-143*  
16 *(Final Findings of Fact, Conclusions of Law and Order)(1982)*. The amount of dust shown in  
17 the pictures, and the amount of dust on the leaf samples, clearly indicates that the Owens were  
18 denied the enjoyment of their property during this period of time.

1 [10]

2 The Board considers three factors when it evaluates the reasonableness of a penalty: (1)  
3 the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken  
4 by the penalized party. *Kaiser Aluminum and Chemical Corp. v. Ecology*, PCHB No. 99-121 &  
5 99-135 (2000); *Deskins Farms v. Ecology*, PCHB No. 98-073 (1998). In doing so, the Board  
6 gives consideration to but is not bound by NWCAA's standard penalty schedule. *Ex. 12*.

7 [11]

8 Based upon the evidence in this case regarding the nature of the violations, the prior  
9 history of, and the subsequent actions taken by Skeers Construction, the Board finds the  
10 \$1,000.00 penalty for failing to use RACT to prevent the release of fugitive particulate matter to  
11 the ambient air, and for causing or allowing the quantity of this particulate matter to become  
12 deposited upon the Owens' property, to be appropriate under NWCAA's penalty guidelines and  
13 under its own *de novo* review. The Board believes, however, that the actions by Skeers  
14 Construction in attempting to clean up the site and its commitment to good business practices  
15 justify a suspension of \$500.00 of this penalty on the condition that no further violation of  
16 Section 550.2 and 550.4 of NWCAA Regulations occur for five years.

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DONE this 2<sup>nd</sup> day of August 2006.

WILLIAM H. LYNCH, Presiding